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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA**

UNITED STATES OF AMERICA,)	IN EQUITY NO. C-125-B
)	
Plaintiff,)	RESPONSE OF THE UNITED
)	STATES OF AMERICA AND THE
WALKER RIVER PAIUTE TRIBE,)	WALKER RIVER PAIUTE TRIBE
)	TO MOTION TO MODIFY CASE
Plaintiff-Intervenor,)	MANAGEMENT ORDER
)	
vs.)	
)	
WALKER RIVER IRRIGATION DISTRICT,)	
a corporation, et al.,)	
)	
Defendants.)	
_____)	

The United States of America (“United States”) and the Walker River Paiute Tribe (“Tribe”) herein respond to the *Motion to Modify Case Management Order* (Apr. 23, 2007) (Doc. No. 1164) (“Motion to Modify”), filed by David Haight and Tom Reviglio, defendants in this action. While the United States and the Tribe agree that some limited activity in this matter should occur prior to the completion of service, no modification of the *Case Management Order* (Apr. 19, 2000) (Doc. No. 108) (“CMO”) is necessary to do so. Some of the other issues raised

in the Motion to Modify have already been considered and rejected by the Court. Other issues raised are already contemplated by the CMO, but are premature to implement.

As a general matter, the Motion to Modify is inconsistent with the Court's previous statements as to how it wishes this litigation to proceed. In addition, the Motion to Modify is inconsistent with the parties' preliminary discussions before the Magistrate Judge, pursuant to the CMO, regarding how they might organize case management subsequent to the completion of service. The Tribe and the United States agree that the parties can begin to complete the effort to identify threshold issues. The Tribe and the United State also believe that the parties should determine how they wish to handle documents and deal with the large number of parties in this matter. As a practical matter, this will take time. During that time, service efforts in this case (and possibly in Case No. C-125-C, as well) can continue to move toward completion. This progression of effort is consistent with the Court's CMO and should avoid the disruption and confusion that the proposals raised by the Motion to Modify would inject into this already complicated matter.

I. BACKGROUND

The Tribe and the United States have filed claims for additional water rights that will require amendment of the *Decree* (Apr. 14, 1936), *modified, Order for Entry of Amended Final Decree to Conform to Writ of Mandate, Etc.* (Apr. 24, 1940) ("Decree"). The Tribe and the United States, acting for the benefit of the Tribe, seek: 1) additional surface flow from the Walker River to serve lands that were included in the Walker River Indian Reservation ("Reservation") after April 14, 1936, which is the effective date of the Decree; 2) confirmation of the right to store water in Weber Reservoir to serve the current decreed lands, as well as

additional lands; and 3) the right to use groundwater underlying the Reservation. *See First Amended Counterclaim of the Walker River Paiute Tribe* ¶¶ 17-22 (July 31, 1997) (Doc. No. 58); *First Amended Counterclaim of the United States* ¶¶ 10-19 (July 31, 1997) (Doc. No. 59).

The Court and the parties have long-considered how best to manage this complex litigation. The result of that careful consideration is the CMO, which represents the Court's consistent approach to protect the rights and interests of those water right holders whose interests the Court has determined could be affected by the instant litigation. Thus, the CMO requires the joinder of all such parties in the lawsuit prior to addressing any threshold issues (Phase I of the litigation under the CMO) or the merits of the additional water rights claims asserted by the Tribe and the United States (Phase II of the litigation under the CMO).^{1/} *See* CMO § 3.^{2/}

The Motion to Modify seeks to amend the CMO to allow litigation to proceed prior to the completion of service. The Motion to Modify seeks five categories of changes to the CMO: filing of dispositive motions; finalization of the identification of the threshold issues; initial disclosures pursuant to Fed. R. Civ. P. 26(a); document discovery; and adoption of a variety of discovery management tools, procedural requirements and sanctions.

^{1/} The CMO also references the Tribe's and the United States' claims to be addressed in Phase II as the "Tribal Claims." The CMO bifurcates consideration of the Tribal Claims from all other claims raised by the United States in its First Amended Counterclaim and defers consideration of these additional claims to later phases. *Id.* at §§ 1, 2, 12(c).

^{2/} Prior to the resolution of the Threshold issues identified below, the U.S./Tribe shall effect service of their respective First Amended Counterclaims, notices in lieu of summons, requests for waiver of service, and the within Case Management Order on all of the members of the categories of water rights holders described below. . . .

CMO § 3 (identifying nine specific categories of persons and entities to be served).

**II. MODIFICATION OF CASE
MANAGEMENT ORDER**

**A. THE COURT HAS ALREADY REJECTED CONSIDERATION OF
DISPOSITIVE MOTIONS PRIOR TO THE COMPLETION OF SERVICE.**

The Motion to Modify seeks approval for filing dispositive motions, specifically noting potential motions based on the defense of laches, to the claims asserted by the Tribe and the United States, which movants contend “can be fully briefed and decided prior to the joining of all parties.” Motion to Modify at 6. The Motion also seeks “the consideration of dispositive motions at an early date,” and asserts that the benefit of filing and considering dispositive motions prior to reaching Phase I of the litigation would be the possible conclusion “of the case without the anticipated long term and comprehensive litigation currently expected.” *Id.* at 7. There is nothing in the Motion to Modify or the current posture of the litigation that should cause the Court to change its previously-stated position that all water rights holders who could be affected by the additional water rights claims asserted by the Tribe and the United States must be made parties to the litigation before any other steps may be taken.^{3/}

This is not the first time that the issue of whether dispositive motions may be filed, briefed and considered prior to completion of service has been raised in this matter. For example, in August 1998, the Tribe and the United States sought the Court’s approval to file dispositive motions prior to completion of service to attempt to narrow the scope of the litigation and thereby narrow the scope of the joinder process. *See, e.g., United States’ and Walker River Paiute Tribe’s Joint Motion for Leave to Serve First Amended Counterclaims, to Join*

^{3/} The Court has taken the same approach in Case No. C-125-C. *See, e.g., Order* (June 2, 1998) (Doc. No. 210).

Groundwater Users, to Approve Forms for Notice and Waiver, and to Approve Procedure for Service of Pleadings Once Parties are Joined at 5 (Aug. 20, 1998) (Doc. No. 62) (“Resolution of the question of who should be served, and which claims shall be included, before proceeding further in this matter will promote judicial economy and avoid unnecessary expenses in this case.”). The Court disagreed with the notion that preliminary issues could be considered prior to completion of the joinder process:

The first issue is whether there should be an initial evidentiary hearing and/or argument to determine whether the groundwater in the basin is sufficiently connected or related to the River itself so that claimants to groundwater must be joined in order to provide complete relief to the counterclaimants. While such a hearing might be deemed necessary to determine if the counterclaims should be permitted to be served it seems questionable that the unjoined groundwater users would be bound by the findings the Court might make as a result of such hearings.

Minutes of the Court at 2 (May 11, 1999) (Doc. No. 81). As a result, the Court made completion of service as to all possible water rights claimants in the Walker River Basin, including groundwater claimants, a prerequisite to the consideration of any other issues – procedural or substantive. *See* CMO § 3.

In May 2001, the Tribe and the United States filed a motion seeking certification of certain defendant classes in this matter, in order to streamline and expedite treatment of certain groups of defendants prior to completion of service. *Joint Motion of the United States of America and the Walker River Paiute Tribe for Certification of Defendant Classes* at 3 (May 3, 2001) (Doc. No. 142) (“Rather than waiting until service is completed, consideration of tools for ‘the efficient management of the litigation given the number of parties to the case,’ appears to be appropriate now.”) (citing CMO ¶ 10). The Tribe and the United States argued that the threshold

issues could be considered in the absence of complete joinder of all parties. Again, the Court disagreed.

We find it very persuasive that our case management order requires all of the parties to be served before determinations are made as to their water rights. Strangely, it seems that the way the class action device would be superior is if the United States and the Tribe were to receive no benefit from the preliminary issues and the declaratory relief. If the United States and the Tribe do receive some relief at the preliminary stage, as we suspect they may, they will be required to join and serve all of the individuals claiming water rights as identified in our case management order. Delaying service of process until after the threshold issues were determined would not in the end alter the time spent in litigation.

Order at 20 (Apr. 26, 2002) (Doc. No. 179).

In sum, the Motion to Modify has not raised any new issues regarding the time for consideration of dispositive motions or threshold issues. The Court has already – more than once – rejected arguments that dispositive motions and the threshold issues should be considered prior to the completion of service. Nothing has changed in the posture of the litigation to alter this requirement, except for the fact that the United States has turned to the task as directed by the Court and devoted a considerable amount of time and resources to service.^{4/}

B. FINALIZATION OF THRESHOLD ISSUES.

The CMO requires the parties “to identify all potential threshold issues promptly and to submit them to the Magistrate Judge for consideration, as he shall direct, so that action may proceed as promptly as possible upon conclusion of service of process.” CMO § 11. As the Motion to Modify notes, the conduct of the litigation was stayed temporarily, except for the

^{4/} The Magistrate Judge completed his review and approval of the service package of documents in approximately July 2003, and service efforts began thereafter.

completion of service, and as a result, the parties have not engaged in further identification of threshold issues, beyond those identified by the CMO. *See* Motion to Modify at 4. The Tribe and the United States agree that the parties can begin to address how and when to identify additional threshold issues, if any, for inclusion in Phase I of the litigation, and that such identification may proceed during the completion of service and joinder of parties. Section 11 of the CMO contemplates the identification of additional threshold issues prior to completion of service so that the Court may begin to consider those issues as soon as service is complete. In that regard, the Tribe and the United States suggest that the Court schedule a status conference at which the parties can begin to discuss a briefing schedule for identification of additional threshold issues.

C. PRIORITIZATION OF THRESHOLD ISSUES.

The Motion to Modify suggests that certain threshold issues have the potential to dispose of this litigation in its entirety and claims that a successful claim of laches would accomplish this result. Motion to Modify at 7. The Tribe and the United States agree that the threshold issues, once completely identified, should be prioritized so that those issues whose resolution might result in the complete or partial disposition of the case or clarification of the scope of claims would be considered first.⁵⁷ The Tribe and the United States believe that the process for prioritizing the threshold issues should be discussed at the status conference suggested above.

D. INITIAL DISCLOSURES AND DOCUMENT DISCOVERY.

In addition to seeking the ability to file dispositive motions, the Motion to Modify seeks

⁵⁷ The United States and the Tribe make this assertion as a matter of addressing the issues of case management before the Court and are not making any assertions herein as to the merits of any potential threshold issue.

to allow the parties to request and make initial disclosures pursuant to Fed. R. Civ. P. 26(a) and conduct document discovery – prior to the completion of service, prior to the identification of all threshold issues, and prior to the filing of any answers. Motion to Modify at 6. The Motion to Modify appears to assert that the suggested changes are consistent with the Federal Rules of Civil Procedure. *E.g., id.* at 5-6 (suggesting that disclosure and discovery at this point are consistent with the current federal rules and their policy underpinnings). To the contrary, movants’ suggested changes would reorder the manner in which litigation is generally conducted and in the context of this action, which may include approximately 4,000 defendants, will disrupt efforts to organize the orderly conduct of litigation.

Although the CMO preceded the adoption by this Court of the disclosure requirements in the 1993 amendments to the Federal Rules of Civil Procedure, it clearly considered the scope and timing of discovery once service had been completed and the threshold issues determined.

(15) Once the Magistrate Judge has finally determined the threshold issues, discovery shall be allowed to all parties on the threshold issues. Discovery shall also be permitted during that same time period concerning the basis for the Tribal Claims; such discovery shall be limited to propounding of interrogatories and requests for production of documents relating to the contentions of the US./Tribe with respect to the basis for the Tribal Claims.

The discovery provided for in this paragraph (15) shall be conducted for such period and according to such terms, conditions, modifications and extensions to this order as shall be determined to be appropriate by the Magistrate Judge.

As provided above, all other discovery is stayed.

CMO at ¶ 15. These directions would allow the Magistrate Judge to consider whether any disclosure requirements are appropriate. *See, e.g.,* Fed. R. Civ. P. 26(a)(1) (identifying one circumstance when “the court must determine what disclosures – if any – are to be made.”).

Furthermore, the CMO directs that “[m]otions which may be dispositive or partially dispositive of any threshold issue shall be deferred until completion of discovery as permitted by this order” CMO § 16. Indeed, courts are generally reluctant to grant dispositive motions as to substantive issues before discovery is completed. *See, e.g., Fed. R. Civ. P. 56(f); Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 n.5 (1986); *Frazier v. Price*, No. 2:06-CV-01196-KJD-PAL, slip op. at 1 (D. Nev. January 8, 2007).

The Tribe and the United States do not agree that initial disclosures should be made or document discovery conducted prior to the completion of service because to do so would contravene the Court’s careful conduct of this case to ensure that everyone who could be affected by this case is present for all substantive steps taken in this case. It is also impractical to do so because duplication of effort will certainly result, despite the suggested procedural requirements and sanctions set out in the Motion to Modify. Indeed, the net impact of movants’ suggested changes would be to sweep the CMO aside and begin litigation.

Furthermore, movants do not appear to have considered the fact that the CMO provides that “[n]o Answers or other pleading will be required except upon further order of the Magistrate Judge entered thereafter.” CMO at § 13. It would be difficult for the parties to make or review disclosures absent having filed answers. As a general matter, the Federal Rules of Civil Procedure contemplate that pleadings and answers are filed prior to requiring disclosures or conducting discovery. Rule 26(a)(1) disclosures are generally required at or within 14 days after the parties’ Rule 26(f) conference, unless a different schedule is agreed to by the parties or issued by the Court or unless parties have objected to the appropriateness of initial disclosures in the Rule 26(f) discovery plan. Also as a general matter, discovery does not proceed until the

parties have conferred as required by Rule 26(f). Fed. R. Civ. P. 26(d). The parties and/or the Court are allowed to make changes to the requirements set out in the Federal Rules of Civil Procedure and the local rules of this Court as warranted by the nature and circumstances of a particular case. That is and continues to be the case here, because this case is a complex matter that will involve several thousand parties. As a very basic matter, it will be chaotic and disruptive to conduct disclosures, document discovery and dispositive motions in advance of service, answers, and appropriately complete discovery. *See* CMO at 2 (“Another major concern is whether persons litigating in later phases of the case may find themselves prejudiced by being bound by decisions and adjudications in earlier phases where they did not participate. This, too, we should endeavor to avoid.”).

E. CASE ORGANIZATION.

The Motion to Modify includes a number of case management suggestions that may be helpful to the organization of this litigation and merit further discussion among the parties and with the Court. The CMO already contemplates that the efficient management of the litigation should be addressed.

(10) Following completion of service of process on the said counterclaims, the Magistrate Judge shall receive recommendations of the parties for procedures for scheduling and for the efficient management of the litigation given the number of parties to the case. Such procedures may include the use of common counsel, special procedures for service of pleadings, or any other mechanisms deemed likely to reduce the burdens on the parties and the court in a case of this magnitude. The Magistrate Judge shall consider and make all appropriate rulings with respect to these matters.

CMO at § 10. As such, the Motion to Modify is not inconsistent with the CMO, but should not

be granted because these and other issues require further study and discussion before they are required to be implemented.

For example, the Tribe and the United States agree that use of the internet in this litigation may help manage a large number of documents and discovered material. The Tribe and the United States have already suggested that a steering committee be formed, consisting of the current, active attorneys in this matter, to oversee the organization and internet publication of information that is discovered in this matter. *See Minutes of the Court* at 3 (Sept. 28, 2005) (Doc. No. 734) (discussing a proposed supplement to the CMO to provide for electronic document availability using the internet, and the establishment of the steering committee). The Tribe and the United States continue to advocate the use of all available means to simplify this complex case and ensure the maximum availability of documents to parties. It is unrealistic to require the use of management tools, such as the internet and document depositories, without discussion of costs, responsibilities, implementation and related issues. Appropriate and careful consideration of such issues is consistent with the CMO. Requiring the implementation of such measures absent appropriate and careful consideration is premature.

III. CONCLUSION.

The Tribe and the United States respectfully request that the Court deny the Motion to Modify and allow the Magistrate Judge to continue his implementation of the CMO.

Dated: May 14, 2007

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of May, 2007, I electronically filed the foregoing

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